No. 87-1855

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IN THE

Supreme Court of the United States

October Term, 1988

THOMAS K. GILHOOL

Petitioner,

v.

RUSSELL A. MUTH, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN COUNCIL OF THE BLIND, AMERICAN SOCIETY FOR DEAF CHILDREN, CHILDREN'S DEFENSE FUND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, MENTAL HEALTH LAW PROJECT, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION, UNITED CEREBRAL PALSY ASSOCIATIONS, INC., UNITED CEREBRAL PALSY OF NEW YORK CITY, AND WESTERN NEW YORK DISABILITY LAW COALITION AS *AMICI CURIAE*

MINNA J. KOTKIN*
KATHLEEN A. SULLIVAN
Brooklyn Law School
One Boerum Place
Brooklyn, New York 11201

ELLEN M. SAIDEMAN
HERBERT SEMMEL
New York Lawyers
for the Public Interest, Inc.
135 East 15th St.
New York, New York 10003

ELIZABETH LOTTMAN SCHNEIDER
Monroe County Legal Assistant Corp.
87 North Clinton Ave., Suite 200
Rochester, New York 14604

Attorneys for Amici Curiae

**Counsel of Record*

January 20, 1989

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INTEREST OF AMICI

Because this case raises important questions concerning the protection of rights expressly secured by Congress through

the Education of the Handicapped Act, the following organizations have a strong interest in participating as *amici*.[1]

The American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members, dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Pennsylvania is one of its affiliates. The ACLU and its affiliates have a deep and continuing interest in protecting the constitutional and statutory rights of disabled individuals, including rights secured by the Education of the Handicapped Act, 20 U.S.C.A. § 1400 *et seq.* (West 1978 & Supp. 1988) (EHA). In order to secure the rights of disabled individuals, the ACLU has represented parties in *Smith* v. *Robinson,* 468 U.S. 992 (1984), *O'Connor* v. Donaldson, 422 U.S. 563 (1975) and the Willowbrook case, *New York State Ass'n for Retarded Children* v. *Carey,* 393 F. Supp. 715 (E.D.N.Y. 1975). The ACLU has appeared *amicus curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982).

American Council of the Blind (ACB), founded in 1961, is a non-profit organization committed to advancing social, economic and educational opportunities for blind and visually impaired Americans. Council members are blind, visually impaired and fully sighted individuals who come from all walks of life but share a common concern: the dignity and well-being of blind people. ACB strives, through a variety of programs and services, to enable blind people to live and work independently, to become active in their communities and to become participants in the democratic process. ACB has chapters in every state/region in the United States and 20

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1. The parties have consented to the filing of this brief. Letters so indicating have been filed with the Clerk of the Court.

special interest affiliated organizations which focus on the unique concerns of blind professionals and other special populations. ACB is especially concerned about appropriate education, which is essential for blind people to achieve independence.

The American Society for Deaf Children (ASDC) is the only non-profit organization in the United States that has as its mission providing information and support to families with deaf or hard of hearing children, especially in the area of education. It has over 20,000 members through its membership and 125 affiliates throughout the country.

The Children's Defense Fund seeks to provide a strong and effective voice for the children of America. It pays particular attention to the needs of poor, minority and handicapped children. The Children's Defense Fund provides research and information on key issues to the public, monitors federal and state policies, and litigates selective cases. The Children's Defense Fund has had a long-standing interest in the education of handicapped children and was instrumental in the passage of the EHA. It has participated *amicus curiae* in *Board of Education* v. *Rowley*, 458 U.S. 176 (1982).

The Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. DREDF is run by and for disabled adults and parents of disabled children. DREDF engaged in numerous activities to secure equal educational opportunities for disabled children, including representing parents and their disabled children in administrative and judicial proceedings under the EHA.

The Mental Health Law Project (MHLP) is a Washington based non-profit organization that advocates on behalf of mentally disabled adults and children. It has long been

involved in efforts to promote appropriate special education for handicapped children. MHLP has appeared *amicus curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982) and *Honig* v. *Doe,* 108 S.Ct. 192 (1988).

The National Mental Health Consumers' Association was organized in Baltimore, Maryland, as a national representative voice for mental health consumers and charged with developing national forums to voice the concerns of mental health consumers. It has more than 5,000 members, including many present and former patients, their families and friends, as well as advocates for the mentally ill. Education is a primary concern of the National Mental Health Consumers' Association since many children who are mental health consumers need special education. The National Mental Health Consumers' Association has appeared as *amicus curiae* in *United States Department of the Treasury* v. *Galioto,* 471 U.S. 556 (1986) and *Colorado* v. *Connelly,* 479 U.S. 157 (1986).

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) is the national association of 55 state and territorial-wide protection and advocacy systems for the developmentally disabled, which are established under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 *et seq.* (West Supp. 1988). NAPAS members are charged with pursuing legal, administrative, and other appropriate remedies to insure the protection of rights of mentally retarded and developmentally disabled persons. 42 U.S.C. § 6042 (West Supp. 1988). Problems that mentally retarded and developmentally disabled children encounter in obtaining the "free appropriate public education" required under the EHA constitute a major area of continuing activity for NAPAS.

United Cerebral Palsy Associations, Inc. ("UCPA") is a national organization with some 180 affiliates, formed in

1948 to promote the interests and well-being of persons with cerebral palsy and to establish and assist state and local affiliates in providing direct services, conducting public and professional education and advocacy programs, and supporting research. The assurance of an appropriate education and of the due process rights guaranteed by the EHA is an integral part of its mission. United Cerebral Palsy of New York City, Inc. ("UCP/NYC") is the largest UCP affiliate in the State of New York, and has had substantial experience wih the implementation of EHA mandates in New York State. UCP/NYC has a particular interest in the questions at issue in this case because New York is one of only three states which allow the Commissioner of Education to act as review officer in administrative appeals. UCP/NYC has challenged this procedure as a plaintiff in *Louis M.* v. *Ambach,* No. 86-CV-919 (CGC) (N.D.N.Y. filed Aug. 13, 1986), a pending class suit which concerns primarily the placement of handicapped children in non-public schools. Both UCPA and UCP/NYC have appeared as *amici curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982).

The Western New York Disability Law Coalition is a group of private and public interest attorneys, advocates, and organizations that provide representation and assistance to handicapped children and adults in matters affecting their legal rights. Members of the Coalition have represented handicapped students in many administrative and judicial proceedings under the EHA, including *J.G.* v. *Rochester Bd. of Education,* 830 F.2d 444 (2d Cir. 1987) (consent decree achieved correcting violations of handicapped students' procedural rights); *Gebhardt* v. *Ambach,* (1982-83) Educ. Hand. L. Rep. (CRR) 554:130 (W.D.N.Y. 1982) (class action against New York State Department of Education on behalf of 100 multiple-handicapped blind students attending the New York State School for the Blind); and *Holmes* v. *Sobol,* 690 F. Supp. 154 (W.D.N.Y. 1988).

STATEMENT OF THE CASE

This case presents two significant questions under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*: first, whether the eleventh amendment bars tuition reimbursement by the state; second, whether Pennsylvania's Secretary of Education is an impartial reviewing officer of appeals from due process hearings under 20 U.S.C.A. § 1415 (West 1978 & Supp. 1988). Under the EHA, Pennsylvania, which receives federal funds pursuant to the Act, must guarantee to each handicapped child in the state a "free appropriate public education." 20 U.S.C.A. § 1412(1) (West 1978), and must establish a system of impartial administrative review procedures through which parents may seek enforcement of this right.

Respondent Muth challenged the local school district's educational plan for his learning disabled and emotionally impaired son through a due process hearing. He then appealed the hearing officer's decision to the Secretary and later filed this action in federal court, as authorized by 20 U.S.C.A. § 1415(e)(2) (West 1978), seeking, among other things, tuition reimbursement for Alexander's attendance at a private school. The district court found Muth entitled to reimbursement because of procedural violations of the Act. The court of appeals found tuition reimbursement an appropriate remedy for the violations of the Act — the lengthy delay in the hearing process and the Secretary's lack of impartiality in reviewing the decision of the hearing officer — and held that the eleventh amendment presented no bar to that relief. *Muth* v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988).

SUMMARY OF ARGUMENT

Tuition reimbursement is an essential remedy to ensure that all handicapped children receive a free appropriate

education as provided in the EHA. *Burlington School Committee* v. *Dept. of Education,* 471 U.S. 359, 369 (1985). If states are not liable for tuition reimbursement, hundreds of thousands of children educated in state schools without local school board involvement will be deprived of tuition reimbursement.

The eleventh amendment does not bar tuition reimbursement against a state. Congress abrogated the states' eleventh amendment immunity in the EHA and in the 1986 amendments to the Rehabilitation Act of 1973, *codified at* 42 U.S.C.A. § 2000d-7(a)(1) (West Supp. 1988).

The Court need not reach the question of whether a chief state school officer may serve as the review officer in special education appeals, because the Court of Appeals found another procedural violation of the EHA, the finality rule, upon which it also based the tuition reimbursement remedy. Petitioner did not seek *certiorari* on that issue.

If the Court reaches the issue, it should hold that a chief state school officer is barred by the EHA from acting as a review officer in individual appeals. Such officers cannot meet the impartiality requirements of the EHA, because they have conflicts with the interests of individuals arising from their fiscal, policy and administrative duties in the state educational system. States have more than adequate means of meeting their supervisory responsibilities under the EHA other than by having chief school officers review individual hearing decisions. Only three states follow such a practice; in the other forty-seven, chief school officers do not act as review officers. The United States Department of Education presumes that chief state school officers cannot act as review officers, a presumption that operates as a categorical prohibition absent a clear and convincing rebuttal.

ARGUMENT

I.

TUITION REIMBURSEMENT IS AN ESSENTIAL REMEDY TO INSURE THAT ALL HANDICAPPED CHILDREN RECEIVE A FREE APPROPRIATE EDUCATION.

A. Without a Tuition Reimbursement Remedy, over 250,000 Handicapped Children Will Be Denied the Protection of the EHA

Tuition reimbursement has already been found to be an available remedy under the EHA. In *Burlington School Committee* v. *Dept. of Education*, 471 U.S. 359, 369 (1985), this Court approved tuition reimbursement, making no distinction whether payment comes from a state or a local education agency. The Court emphasized the importance of the tuition reimbursement remedy to effectuate the purposes underlying the EHA. Without it, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards [of the Act] would be less than complete." *Id.* at 370.

Full enforcement of the EHA can only be achieved if tuition reimbursement is available from the states. A local school board will not always be available to pay the tuition. In a significant number of cases, a state — not a local school board — is the party opposing a parent's challenge under Act. In at least one state, Hawaii, there are no local school districts and education is provided directly by the state agency. Hawaii Rev. Stat. § 298-2 (1988). Many states, including Pennsylvania, operate schools for the blind and deaf, and others provide educational services under the Act for children institutionalized in facilities for the mentally retarded and

developmentally disabled. Often, the most severely handicapped children attend schools directly operated by states rather than by local school districts. In 1987-88, some 250,000 handicapped children,[2] approximately 6% of the total number of children receiving education under the Act,[3] attended such schools.

As petitioner acknowledges, Petitioner's Brief (Pet. Br.) at 71, Congress was aware that state agencies directly provide educational services to some children, and the statute explicitly recognizes this. *See* 20 U.S.C. § 1414(d)(West 1978). In Pennsylvania, for example, there are five special schools at which the Commonwealth directly provides educational services and directly participates in the development of individual educational plans. Pet. Br. at 71. If Pennsylvania were not liable for tuition reimbursement, children deprived of an appropriate educational opportunity by these special state schools would be denied an essential remedy identified in *Burlington*.

Disputes between parents and states providing educational services can arise in a number of contexts. A state school may deny a handicapped child admission or may expel a handicapped child, forcing the parent to make a private placement and incur tuition expenses while challenging the state's decision through administrative and, if necessary, judicial

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2. U.S. Department of Education, Office of Special Education, "Number of Children 0-20 Years Old Served under Chapter 1 of ECIA (SOP) by Handicapping Condition," October 1, 1988.

3. In 1985-86, there were a total of 4,370,244 handicapped children nationwide. U.S. Dept. of Educ., *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 1987, at 2-3.

review. Since the local school board is in no way involved in the decision, and indeed may have recommended the state school placement, imposition of tuition costs on the local school board would be inappropriate. *See, e.g., Robert D.* v. *Sobol,* 688 F. Supp. 861, 867 (S.D.N.Y.), *appeal dismissed,* No. 88-7444 (2d Cir. 1988).

Similarly, a state school may develop an individualized educational program (IEP) for a currently enrolled child that the parents believe is inappropriate. If the parents incur tuition expenses to provide the child with an appropriate program at another school, and are unable to recover tuition reimbursement if they successfully challenge the state's actions, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not... be reimbursed..." *Burlington,* 471 U.S. at 370.

Finally, many handicapped children are educated in private schools at public expense, because there is no appropriate placement in the public schools. In some states the state educational agency must approve any private school placement, even when the IEP developed by the parents and the local school board calls for a private school placement. *See, e.g.,* N.Y. Educ. L. § 4402(2)(b) (McKinney's Supp. 1988). If the state rejects the private placement provided for in the IEP, and the parent pays the tuition, it is only appropriate that the state be responsible for reimbursement.

The EHA was intended to provide a free appropriate public education to all children, regardless of whether they attend schools operated by the state or by their local school district. This explicit mandate cannot be fully realized unless the remedies available under the Act apply with equal force to state educational agencies and to local school boards.

B. Tuition Reimbursement Furthers, Rather than Frustrates, the Central Goals of the EHA.

The policy underlying the tuition reimbursement remedy was clearly articulated in *Burlington* only four years ago and should not be reexamined here. Tuition reimbursement is not a "damage remedy," as petitioner contends. Pet. Br. at 50, 52, 53, 54. Rather, it merely requires payment of expenses that an educational agency "should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 371.

Pennsylvania's view of tuition reimbursement as in some sense punitive is not a position shared by all states. In *Burlington* the prevailing respondent, the Commonwealth of Massachusetts, advocated the availability of tuition reimbursement. The Commonwealth argued that reimbursement is the "only meaningful remedy for the parents who paid for an appropriate private school placement . . . ," and "ensures that the overriding objective of providing education that is both free and appropriate, is met." Brief of Respondent, *Burlington School Comm.* v. *Dept. of Educ.*, 471 U.S. 359 (1985) (available on LEXIS at 18, 19). Moreover, "reimbursement serves another purpose underlying the EHA, encouraging parental participation in educational decisions . . ." *Id.* at 20.

These policy considerations persuaded this Court that tuition reimbursement was an appropriate remedy under the Act. The competing policy considerations enunciated by the petitioner here are no different than those this Court rejected in *Burlington*.

II.

THE ELEVENTH AMENDMENT DOES NOT BAR TUITION REIMBURSEMENT

Congress abrogated the states' eleventh amendment immunity in enacting the EHA by making the states primarily responsible for providing education under the Act. Rather than elaborating on congressional abrogation in the EHA, an issue that Respondent Muth has thoroughly explored, *amici* address two additional bases for concluding that Congress intended to make states liable for tuition reimbursement, notwithstanding the eleventh amendment.

A. The 1986 Amendments to the Rehabilitation Act Demonstrate Congress' Intent To Abrogate States' eleventh amendment Immunity for Violations of the EHA.

Congressional intent in the language of the EHA to abrogate the eleventh amendment immunity was made clear with the enactment of the 1986 Amendments to the Rehabilitation Act of 1973. Pub. L. 99-506, § 1003(a)(1), 100 Stat. 1845, *codified at* 42 U.S.C. § 2000d- 7(a)(1) (West Supp. 1988) provides:

> A State shall not be immune under the eleventh amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29 ... *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance* (emphasis added).

Under this amendment, two requirements for a finding of abrogation within a statute are set forth: receipt of federal

financial assistance, and a prohibition against discrimination. The first is clearly satisfied: states' obligations under the EHA are contingent on receipt of federal financial assistance, 20 U.S.C.A. §§ 1412, 1415 (West 1978), and Pennsylvania receives such funds.

The EHA is an anti-discrimination statute within the meaning of the Rehabilitation Act amendment. Congress adopted the EHA to remedy the discrimination that had denied many handicapped children a free public education. The preamble to the Act states that, "one million of the handicapped children in the United States are excluded entirely from the public school system..." 20 U.S.C.A. § 1400(b)(4) (West Supp. 1988). The language of the Act itself reflects Congress' purpose to "assist State and local efforts to provide programs to meet the educational needs of handicapped children *in order to assure equal protection of the law* [emphasis added]." 20 U.S.C. § 1400(b)(9) (West Supp. 1988). "The guarantee of equal protection . . . is . . . a right to be free from invidious discrimination . . . in governmental activit[ies]." *Harris* v. *McRae*, 448 U.S. 297, 322 (1980).

The legislative history of the EHA provides further evidence that the Act is as a federal statute prohibiting discrimination by recipients of federal funds. The Senate Report states that: "[i]t is this Committee's belief that the Congress must take a more active role under its responsibility for *equal protection of the laws* to guarantee that handicapped children are provided equal educational opportunity... [The statute] takes positive necessary steps to ensure that the rights of children and their families are protected." S. Rep. No. 168, 94th Cong., *reprinted in* 1975 U.S. Code Cong. & Ad. News 1433 (emphasis added).

The deliberations over the 1986 Rehabilitation Act amendments reveal that Congress intended to abrogate states'

eleventh amendment immunity in situations such as this, where otherwise, a local entity but not a state entity would be liable for the same type of violation. The Senate Report, for example, criticized this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), holding that there was no congressional intent in the Rehabilitation Act to abrogate immunity:

> [*Atascadero*] misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended. It would be inequitable for Section 504 to mandate state compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue. S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986).

The remarks of Senator Cranston, who sponsored the Rehabilitation Act amendments, demonstrate that Congress clearly intended the abrogation provision to apply to suits against state agencies for discriminating against handicapped individuals in the provision of education:

> As a result of the Court's decision [in *Atascadero*] a disabled individual who has suffered unfair discrimination at the hands of a State agency has two choices—a suit in State court for damages or injunctive relief, or both, or Federal suit for an injunction against individual State officials. Those choices are not adequate. As to the limit on Federal remedies, litigation involving a claim of discrimination often takes years to resolve. Thus, where the disabled person is seeking employment or *is trying to pursue an education* . . . an injunction may come too late to be a value in remedying the harm done through the

> unlawful discrimination. 132 Cong. Rec. S15104-5 (daily ed. Oct. 3, 1986) (emphasis added).

Indeed, the legislative history reflects Congress' intent to reverse the presumption against abrogation enunciated in *Atascadero,* with respect to statutes proscribing discrimination against handicapped persons. Senator Cranston stated, for example, "as a result of this legislation, if a federal suit for damages were generally available to enforce a civil rights law against a recipient of Federal funds—and nothing in that law were to exempt the States from such a suit—a Federal suit for damages would now be available against a state or a State agency." 132 Cong. Rec. S15105 (daily ed. Oct. 3, 1986). The amendments to the Rehabilitation Act thus represent a congressional effort to authorize remedies such as tuition reimbursement, for *all* handicapped students under the EHA.

B. Tuition Reimbursement Actions Against State Agencies Are Authorized under the Rehabilitation Act Amendments and a Bar to Such Actions under the EHA Would Be Futile.

Petitioner urges this Court to preserve the "fundamental values of sovereign immunity" by holding that the eleventh amendment bars tuition reimbursement under the EHA. *See,* Pet. Br. at 39. Were this court to so hold, however, tuition reimbursement would remain an available remedy under the Rehabilitation Act. Thus, an eleventh amendment bar to tuition reimbursement claims under the EHA will not vindicate any state interest in sovereign immunity.

In *Smith* v. *Robinson,* 468 U.S. 992 (1984), this Court established the EHA as the sole vehicle for remedying claims of the denial of a free appropriate public education. *Smith* held that Congress, in enacting § 504 "did not intend a handicapped child to be able to circumvent the requirements or

supplement the remedies of the [EHA] by resort to the general antidiscrimination provision of § 504 of the Rehabilitation Act, 29 U.S.C. § 794." *Id.* at 1018.

In 1986, however, Congress effectively overruled this Court's decision in *Smith*, by adding 20 U.S.C. § 1415(f),[4] which preserves a right of action under the Constitution and the Rehabilitation Act for claims involving the denial of a free appropriate public education. "The new § 1415(f) states that the provisions of the EHA do not provide the exclusive avenue for redress available to handicapped children, and that § 504 of the Rehabilitation Act of 1973 ... may be used ... to enforce EHA educational rights..." *Mrs. W.* v. *Tirozzi*, 832 F. 2d 748, 751 (2d Cir. 1987); *See also Digre* v. *Roseville Schools Independent School District No. 623*, 841 F. 2d 245 (8th Cir. 1988); *Martinez* v. *School Board of Hillsborough*, 861 F. 2d 1502 (11th Cir. 1988). Since there is no eleventh amendment bar to tuition reimbursement claims under section 504, parents may alternatively recover tuition reimbursement from the state under section 504.

As a result, if petitioner were to prevail, the remedy that this Court identified in *Burlington* as so important to the effectuation of the EHA will be available by resort to a more generalized statute, the Rehabilitation Act, but not under the EHA itself. Congress could not have intended such an absurd result. The availability of tuition reimbursement from a state

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4. 20 U.S.C § 1415(f) (West Supp. 1988) provides, in relevant part:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth ...

under section 504 further indicates Congress intended to abrogate the eleventh amendment immunity for violations of the EHA.

III.

THIS COURT NEED NOT REACH THE QUESTION OF WHETHER A CHIEF STATE SCHOOL OFFICER MAY SERVE AS THE REVIEW OFFICER IN SPECIAL EDUCATION APPEALS.

This Court need not rule on the second question presented: whether the chief state school officer[5] is barred from serving as the review officer in special education appeals. The court of appeals found two violations of the procedural requirements of the EHA: first, the Secretary's remand of the proceeding denied respondent a final decision; and second, the Secretary's role as state-level review officer deprived respondent of an impartial administrative appeal. While the court of appeals based its affirmance of tuition reimbursement primarily on Pennsylvania's violation of the finality requirement, *Muth* v. *Central Bucks School Dist.*, 839 F.2d 113, 127 (3d Cir. 1988),[6] the Secretary did not seek *certiorari* on the question of whether the remand violated the Act. *Gilhool* v. *Muth*, 56 U.S.L.W. 3839 (U.S. June 7, 1988) (No. 87-1855) (questions presented). *See also Gilhool* v. *Muth, cert. granted*, 109 S.Ct. 52 (1988).

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5. The term "chief state school officer" is used to refer to the chief executive of a state educational agency, such as Petitioner Gilhool.

6. Significantly, the district court did not even address the issue of impartiality in its decision awarding tuition reimbursement. *Muth* v. *Smith, slip op.* (E.D. Pa. Aug. 28, 1986).

It was the remand by the Secretary that prevented Muth from obtaining a timely review decision, and as a result, Muth unnecessarily incurred tuition expenses. Thus, regardless of any decision by this Court on the issue of the Secretary's impartiality, an unchallenged violation of the EHA survives, for which tuition reimbursement was awarded. A reversal by this Court on the impartiality issue would not require the court of appeals to reexamine its holding on the remand issue. Therefore, the only question necessarily before this Court is whether the relief awarded by the Court of Appeals comports with eleventh amendment.

IV.

AS A MATTER OF LAW, THE EHA PRECULDES A CHIEF STATE SCHOOL OFFICER FROM SERVING AS REVIEW OFFICER IN SPECIAL EDUCATION APPEALS.

This Court has recognized that the EHA's procedural protections are of paramount importance in insuring that appropriate educational opportunities are provided to handicapped children:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 205-06 (1982).

See also Honig v. Doe, 108 S.Ct. 592, 198 (1988); *Burlington*, 471 U.S. at 368-69 (1985); *Smith* v. *Robinson*, 468 U.S. 992, 1010-11 (1984).

A chief state school officer should not and need not personally decide special education appeals in order for the officer to properly carry out his supervisory functions under the EHA. In forty seven states, the state education agency executive does not decide individual special education appeals.[7] Only in Pennsylvania, New York and Minnesota do the chief state school officers review appeals from hearing decisions. Thus, a ruling by this Court barring chief state school officers from reviewing appeals would require only three states to change their laws and procedures.

A. The EHA's Procedural Structure Precludes a Chief State School Officer from Serving as an Impartial Review Officer

An impartial review officer is an essential element of the procedural safeguards set forth in the EHA. In order to ensure impartial decision-making in the administrative process, the EHA prohibits an employee of an agency "involved in the education or care of the child" from serving as hearing officer in an initial due process hearing, whether held at the local or state level. 20 U.S.C.A. § 1415(b)(2) (West 1978). If a state elects a two-tiered administrative process, the EHA requires that a state-level review of a local hearing decision also be impartial and that the review officer make an independent decision based on the record. 20 U.S.C.A. § 1415(c) (West 1978).

Since a state-level review may be converted into a "hearing" for the taking of additional evidence, 34 C.F.R.

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7. Appendix A is a chart of the special education review systems of the fifty states and the District of Columbia.

§ 300.510 (1987), the standards of impartiality which apply to a first-level hearing officer must also apply to a state-level review officer. Congress indicated as much when it referred to both first-level hearings and state-level reviews as "hearings" and stated that both must be conducted in a similar manner and afford parents similar rights. 20 U.S.C.A. § 1415(d) (West 1978). Furthermore, Congress intended that parents have access to an equally impartial administrative remedy whether they reside in a state using a one-tiered or a two-tiered system. Therefore, like a first-level hearing officer, a state-level review officer must be impartial and cannot be an employee of an agency involved in the education of the child.

The EHA's legislative history reveals clear congressional intent that chief state school officers be barred from serving as review officers:

> [N]o hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings *and individuals conducting a review of the local due process hearing* ... S. Conf. Rep. No. 455, 94th Cong. 1st Sess. 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1502 (emphasis added).

The original bill, which barred only employees of an agency "directly involved" in the education of the child from serving as hearing officers, was amended by the Conference Committee to eliminate the word "directly." S. Conf. Rep. No. 455, *supra*, at 47-49, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 1500-02. Thus, Congress "intentionally expanded [the EHA's] prohibition to include employees of

state educational agencies not directly involved in the education of the child and to disqualify them from serving as hearing officers." *Robert M.* v. *Benton*, 634 F.2d 1139, 1142 (8th Cir. 1980).[8]

A number of courts have examined this legislative history and have found that Congress intended that the state education agency employees not serve as review officers because they do not meet the Act's impartiality requirements.[9] The two courts that have upheld review by the chief state school officer did not consider the legislative history,[10] and in both

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8. The Secretary's argument that the specific provisions of the consent decree in *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 279 (1972) (PARC) should override the express intent of Congress on this point is without merit. This Court recently held that the conspicuous absence in the EHA of a specific provision contained in the *PARC* consent decree is indicative of congressional intent to omit the provision. *Honig* v. *Doe*, 108 S.Ct. at 605.

9. *Muth*, 839 F.2d at 122-24; *Colin K.* v. *Schmidt*, 715 F.2d 1, 5 n.3 (1st Cir. 1983); *Grymes* v. *Madden*, 672 F.2d 321, 323 (3d Cir. 1982); *Helms* v. *McDaniel*, 657 F.2d 800, 806 n.9 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982) (State Board of Education); *Holmes* v. *Sobol*, 690 F. Supp. 154, 160 (W.D.N.Y. 1988) (Commissioner of Education); *Vogel* v. *School Bd. of Montrose*, 491 F. Supp. 989, 995 (W.D. Mo. 1980) (Deputy Commissioner of Education). *See also Robert M.*, 634 F.2d at 1141-42 (chief state school officer "statutorily disqualified" from serving as hearing officer even though state educational agency does not directly provide educational services); *Mayson* v. *Teague*, 749 F.2d 652, 657-59 (11th Cir. 1984) (univeristy personnel involved in developoment of state educational policies may not serve as hearing officers); *Kotowicz* v. *Mississippi St. Bd. of Educ.*, 630 F. Supp. 925 (S.D. Miss. 1986) (applying *Mayson* to state-level review officers).

10. *Victoria L.* v. *District School Bd. of Lee Co.* 741 F.2d 369, 374 (11th Cir. 1984); *Brandon E.* v. *Wisconsin Dept of Pub. Instruction*, 595 F. Supp. 740, 746 (E.D. Wis. 1984).

cases, the state subsequently changed its review system to eliminate the involvement of the chief state school officer in EHA hearings and reviews.[11]

The federal agency charged with enforcing the EHA has interpreted the Act as barring review by a chief state school officer:

> Our review of the express language of the statute, its legislative history and the varied positions taken by different Federal courts has led us to conclude that with respect to the designations of SEA employees, chief state school officers and members of State boards of education a presumption arises under the Act that such persons are involved in the education and care of all handicapped children in the state and, thus, are generally precluded from serving as state level review officials under section 615(c). Absent a clear and convincing rebuttal, this preusmption operates as a categorical prohibition. U.S. Department of Education, Office of Special Education, Divison of Assistance to the States, Revised DAS Bulletin #107, *reprinted in* [1987-87 Transfer Binder, EHA Rulings/Policy Letters] Educ. Hand. L. Rep. 203:19 (Jan. 16, 1984) (DOE Bulletin).[12]

As a "construction adopted by the agency charged with monitoring and enforcing the statute," this interpretation is entitled to considerable deference. *See, e.g., Honig*, 108 S.Ct. at 604, n.8; *Chevron, U.S.A., Inc.* v. *Natural*

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11. *See* Florida and Wisconsin in Appendix A.

12. A copy is reproduced as Appendix B.

Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

The DOE Bulletin sets forth factors which may rebut the presumption of bias, which include showings that the review officer was not substantially involved in development of any policy in question at the hearing, is not responsible for the general supervision of education programs for handicapped children and has no personal, economic or professional interest in the outcome of the hearing. DOE Bulletin, EHLR (CRR) [1977-87 Transfer Binder EHA Rulings/Policy letters] 203: 19, 19-20. (Jan. 16, 1984). Absent such a showing, the presumption is conclusive.

In his brief to this Court, the Secretary repeatedly acknowledges that he is "substantially involved" in the development of all state policies regarding the education of handicapped children and that he is responsible for the general supervision of all education in the state, including education programs for handicapped children. Pet. Br. at 65-69, 78-82, 86. While the Secretary asserts these facts as reasons why he *must* serve as review officer in special education appeals, DOE has determined that such involvement in policymaking and general supervision are the very factors which prevent a chief state school officer from being completely impartial in an individual special education appeal.

B. Chief State School Officers Have Fiscal, Policy and Supervisory Responsibilities Inconsistent with the Role of Impartial Review Officer.

Congress mandated a higher standard for impartiality for hearing and review officers in the EHA than the "rudimentary" constitutional due process requirements set forth in *Goldberg* v. *Kelly*, 397 U.S. 254, 267, (1970). Although *Goldberg* barred only those adjudicators who "have

participated in making the determination under review," *id.* at 271, Congress intended to further insulate the EHA hearing and review process from the possibility of conflict of interest. *See Helms* v. *McDaniel*, 657 F.2d 800, 805 n.8 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1946) (EHA's impartiality requirements are greater than those that satisfy constitutional due process). Congress recognized that the state educational agency is involved in the education of all handicapped children in the state because the state educational agency funds most of the state's special education programs and sets educational policy for the state. The pervasive role of the state educational agency in the special education program creates conflicts of interest which are contrary to notion of impartial decisionmaking.

The conflict of interest is most apparent in the fiscal context. States that accept federal funding under the EHA are obligated to provide appropriate educational services to all handicapped children, 20 U.S.C.A. § 1412 (West 1978 & Supp. 1988), using state funds in addition to federal funds received under the EHA.[13] The bulk of the monies used to finance special education comes from the states. In 1986 Pennsylvania spent approximately 447 million dollars of state funds and only 59 million dollars of federal funds on special education. Pet. Br. at 51, n.11.

State educational agencies often pay a higher proportion of special education costs than local school districts for certain programs pursuant to state statutes. For example, the

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13. Under the EHA, the federal allocation to the state represents only a percentage of the total cost of educating a child. 20 U.S.C.A. § 1411 (West 1978 & Supp. 1988).

Commonwealth of Pennsylvania is statutorily responsible for eighty percent of the cost of a private placment such as that originally sought by respondent Muth. Pa. Stat. Ann. tit. 24, § 13-1376-1377 (Purdon Supp. 1988). *See also* N.Y. Educ. Law § 4404 (McKinney 1981 and Supp. 1988); N.Y. Comp. Codes R. & Regs., tit. 8, § 200.9 (1987). In New York, as in some other states, the State Commissioner of Education must approve all private placmeents even though the parents and the local school district agree that a private placement is appropriate and the individual education plan so provides. N.Y. Educ. Law. §4402(2)(b) (McKinney's Supp. 1988). *See also* Pa. Stat. Ann., tit. 24, §§13-1376(a) (Purdon Supp. 1988). If the Commissioner disapproves the placement, the parents must seek an impartial hearing). which may be followed by review by the Commissioner of his own decision denying the *private placement.*[14] *See Robert D.* v. *Sobol,* 688 F. Supp. 861 (S.D.N.Y. 1988), *appeal dismissed,* No. 88-7444 (2d Cir 1988); *Michael M.* v. *Board of Education,* 686 F. Supp. 995 (E.D.N.Y. 1988).

The fiscal conflict of interest is also illustrated in New York, where the Commissioner of Education, rather than the local school district, pays 90% of the cost of summer educational services for handicapped children. N.Y. Educ. Law § 4408 (McKinney's Supp. 1988). In *Holmes v.* Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988), the Commissioner reversed a decision of the impartial hearing officer granting summer services. The federal district court then granted preliminary

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14. A class action challenging this procedure is presently pending in the Northern District of New York, *Louis M.* v. *Ambach,* 86-CV-919 (CGC) (filed Aug. 13, 1986). *Amicus* United Cerebral Palsy of New York City is a plaintiff in that action.

relief overruling the Commissioner, finding a likelihood of success on the merits on the argument that the Commissioner lacked impartiality.

A conflict of interest also may occur when a state educational policy conflicts with the individualized needs of a particular child. For example, some states have established a state-wide system of providing many special educational programs on a regional basis, rather than by making appropriate accommodations in the handicapped child's home school. In some cases, regional schools are separate facilities for the handicapped, creating a conflict between state policy and the child's EHA right to be educated in the least restrictive environment, 20 U.S.C. § 1412(5)(West 1978). *See, e.g., Tessar* v. *Mounds View Indep. School Dist.*, No. 3-88-342 (D.Minn. filed May 25, 1988) (action challenging the Commissioner's impartiality where he reversed a hearing officer's decision awarding home school rather than regional school placement).

Congress intended in the EHA to insure *individualized* decision-making for each handicapped child and to insure that each child's program is based on the child's needs. 20 U.S.C. § § 1400(c) (West Supp. 1988), 1401(18),(19) (West 1978). The Secretary's insistence on combining the state educational agency's rule-making, enforcement and adjudicating functions by personally ruling in individual special education appeals interferes with the impartiality of the adjudicatory process.[15]

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15. The United States Department of Education has determined that a "professional" conflict of interest disqualifies a person from acting as a state level review officer. *See* Appendix B. A person who has been involved in development of state policy has a professional conflict of interest. *Mayson* v. *Tegue*, 728 F.2d 652, 658-59 (11th Cir. 1984).

C. The Secretary Can Carry Out His Monitoring and Enforcement Responsibilities under the EHA without Serving as Review Officer

States have many other means of meeting their supervisory obligations under the EHA, 20 U.S.C. § 1412(6) (West 1978), which include rule-making, site visit monitoring, disseminating manuals and curricula, training educational personnel, providing technical assistance, and, in extreme cases, cutting off funds to schools and school districts. In addition to these activities, the state educational agency is required by the EHA to "consider any decision [resulting from a due process proceeding] which is adverse to the local educational agency or intermediate educational unit involved in such decision." 20 U.S.C. § 1414(b)(3) (West 1978). This statutory language alone is sufficient to indicate that Congress did not contemplate that the chief executive officer of the state educational agency would be making the decisions in these individual cases. Rather, Congress' purpose was to insure that the state educational agency would be aware of rulings being handed down in individual cases so that it could take appropriate corrective measures if the decisions revealed that actions of local school districts or the state educational agency itself were found improper under the EHA.

Thus, the Secretary can further all of the interests on which he bases his need to serve as review officer by engaging in appropriate monitoring and training activities. It is not necessary for him to issue each review decision himself, and, in view of his potential conflict of interest in the out-

come of such cases, it is also improper and prohibited by the EHA.

V.

SHOULD THE COURT FIND THAT THE EHA DOES NOT BAR A CHIEF STATE SCHOOL OFFIIER FROM SERVING AS REVIEW OFFICER AS A MATTER OF LAW, THE COURT SHOULD REMAND THIS CASE FOR DEVELOPMENT OF THE RECORD ON THE SECRETARY'S IMPARTIALITY

If there is any question as to whether the EHA bars the chief state school executive from serving as review officer as a matter of law, this Court should remand this case for development of the factual record. There are significant factual findings that would assist this Court in determining the Secretary's impartiality. In this case, however, there is no factual record on the actual practices and procedures utilized by Secretary Gilhool in conducting state-level reviews.

Among the factual issues that would be significant in resolving the question of the Secretary's impartiality are: whether the Secretary was involved in developing policies that relate to the issue in this case; whether the Secretary takes into account the state educational agency's budgetary concerns in reviewing relief awarded by hearing officers; whether the Secretary has engaged in a pattern of reversing decisions that award a particular type of relief, (for example, private school placement); whether certain state educational policies unrelated to the EHA (for example, to promote full utilization of school buildings) are considered by the Secretary in his EHA review function; whether the Secretary reviews the entire record of the hearing as specifically required by the Act (34 C.F.R. § 300.510) (1987); and

whether the Secretary considers matters outside of the administrative record without notice to the parties.[16]

In the two other states where the chief executive officer of the state educational agency reviews hearing decisions—New York and Minnesota—actions are pending which challenge the officer's impartiality. *See Holmes* v. *Sobol*, 690 F. Supp. 154 (W.D.N.Y. 1988); *Tessar* v. *Mounds View Indep. School Dist.*, No. 3-88-342 (D.Minn. filed May 25, 1988). In both cases, the parties are engaging in discovery to address the factual issues noted above.[17]

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16. Indeed, the Secretary's assertion that he "combine[s] both policymaking and implementing functions" with his review of individual appeals (Pet. Br. at 65) raises serious, but unexplored questions concerning his impartiality. The DOE Bulletin, discussed *supra* and attached as Appendix B, indicates that such a combination of functions constitutes a violation of the EHA.

17. Conversations with Elizabeth Lottman Schneider, attorney for Adam Holmes and counsel for *amici* here, and with Lawrence J. Ringer of Mid-Minnesota Legal Assistance, Inc., attorney for Molly Tessar.

CONCLUSION

For the reasons stated above, the decision of the United States Circuit Court for the Third Circuit should be affirmed.

Respectfully submitted,

MINNA J. KOTKIN*
KATHLEEN A. SULLIVAN
Brooklyn Law School
One Boerum Place
Brooklyn, New York 11201

ELLEN M. SAIDEMAN
HERBERT SEMMEL
New York Lawyers
for the Public Interest, Inc.
135 East 15th St.
New York, New York 10003

ELIZABETH LOTTMAN SCHNEIDER
Monroe County Legal Assistant Corp.
87 North Clinton Ave., Suite 200
Rochester, New York 14604

Attorneys for Amici Curiae

**Counsel of Record*

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SPECIAL EDUCATION REVIEW SYSTEMS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

STATE	ONE-TIERED* OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION**
Alabama	one	N/A	Alabama St. Dept. of Educ., Div. of Student Instructional Services, Prog. for Exceptional Children & Youth, Admin. Policy Manual, Bull. No. 36, § 8.4.4 (1986).
Alaska	two	State Board of Education++	Alaska Admin. Code tit. 4, §§ 52.560, .570 (eff. 7/1/83).
Arizona	two	non-SEA employee/ official	Ariz. Comp. Admin. R. & Regs. R7-2-405 (U)(1978).
Arkansas	one	N/A	Ark. Stat. Ann. §6-41-216 (1987); Ark. St. Bd. of Educ., Referral, Placement & Appeal Procedures: Special Education & Related Services (I)(7)(1987).

* All states with one-tiered systems utilize non-SEA employees/officials as hearing officers, with the exception of North Carolina.

** Citations are to the highest level source in which the relevant position is found, in the following order: state statute, state code of regulations, SEA rules or regulations, controlling court orders, SEA policies or bulletins, State Plan Under Part B of Public Law 94-142 (the EHA).

\+ Source cited does not state whether or not SEA employee/official may serve as hearing or review officer, but state's practice is to use non-SEA employee/officials.

++ In Alaska the review is conducted by the State Board of Education, but an independent review officer is appointed if additional evidence is taken during the review.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
California	one	N/A	Cal. Educ. Code § 56505 (West Supp. 1989).+
Colorado	two	non-SEA employee/ official	1989-1990 Colo. St. Plan Under Pt. B of P.L. 94-142, § VII (B)(4) & (5).
Connecticut	one	N/A	Conn. Gen. Stat. Ann. § 10-76h(d) & (e)(West 1986).
Delaware	one	N/A	Del. Code Ann. tit. 14, §§ 3137, 3141 (1986).
District of Columbia	one	N/A	Mills v. Bd. of Educ., 348 F.Supp. 866, 881 (D.D.C. 1972).
Florida	one	N/A	Fla. Stat. Ann. § 230.23 (4)(m)(4)(West Supp. 1989).
Georgia	two	non-SEA employee/ official	Ga. Dept. of Educ., Regs. & Procedures, § II(G) (1988).+
Hawaii	one	N/A	Regs. of Haw. Dept. of Educ., tit. 8, subtit. 2, pt. 1, ch. 36, § 8-36-14 (eff. 1/6/86).
Idaho	two	non-SEA employee/ official	Idaho St. Bd. of Educ., Rules & Regs. Pertaining to Special Educ. & Fed. Regs. Under P.L. 94-142, § 3.11.8.6 (July, 1985).+
Illinois	two	non-SEA employee/ official	Ill. Ann. Stat. ch. 122, para. 14-8.02 (h) (Smith-Hurd Supp. 1988); Ill. Admin. Code tit. 23, § 226.680 (eff. 10/22/86).

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Indiana	two	non-SEA employee/ official	Ind. Admin. Code tit. 511, r. 7-1-3(h)(1)(1984). +
Iowa	one	N/A	Iowa Admin. Code r. 281-41.43,.44 (1988). +
Kansas	two	non-SEA employee/ official	Kan. Stat. Ann. §72-974 (Supp. 1987). +
Kentucky	two	non-SEA employee/ official	707 Ky Admin. Regs. 1:060 (1983) (incorporating St. Bd. of Educ. Due Process Policy & Proc. Manual at 20-22 (July, 1983). +
Louisiana	two	non-SEA employee/ official	Regs. for Implementation of Exceptional Children's Act. R.S. 17: 1941 et seq., Bull. 1706, §§ 510, 514 (1983). +
Maine	one	N/A	Me. Rev. Stat. Ann. tit. 20-A, §7207-B(2) (Supp. 1988). +
Maryland	two	non-SEA employee/ official	Md. Educ. Code Ann. §8-415(b) (Supp. 1988).
Massachusetts	one #	N/A	Mass. Regs. Code tit. 603, §§ 400.0-411.0 (1986).
Michigan	two	non-SEA employee/ official	Mich. Admin. Code r. 340.1725 (1987). +

The appeal from a hearing decision to the State Advisory Committee referred to in the Massachusetts statute and regulations has been eliminated.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Minnesota	two	Commissioner of Educ. or SEA employee designated by the Commissioner	Minn. Stat. Ann. § 120.17(3b)(f) (West Supp. 1989).
Mississippi	two	non-SEA employee/ official	1989-91 Miss. St. Plan Under Pt. B of P.L. 94-142, at 55-56.+
Missouri	two	non-SEA employee/ official	Mo. Ann. Stat. § 162.961(2) (Vernon Supp. 1989).
Montana	one	N/A	Mont. Admin. R. 10.6.103A, 10.6.119A (1988).
Nebraska	one	N/A	Neb. Rev. Stat. §§ 79-3350, -3354 (Reissue 1987).+
Nevada	two	non-SEA employee/ official	Nev. Admin. Code ch. 388, § 388.315 (1988).
New Hampshire	one	N/A	N.H. Code Admin. R. [Educ.] 1127.02 (1988).
New Jersey	one	N/A	N.J. Admin. Code tit. 1, §§ 1:6A - 3.4, 1:6A - 5.3 (1988).
New Mexico	two	non-SEA employee/ official	Educational Standards for N.M. Schools, ch. 3, § B.3.3 (1988).+

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
New York	two	Commissioner of Education	N.Y. Educ. Law § 4404 (McKinney Supp. 1988).
North Carolina	one	N/A	N.C. Gen. Stat. § 115C-116(d) to (i)(Supp. 1988).
North Dakota	one	N/A	N.D. Special Educ. Regs. & Policies, §§ 7.5.5, 7.5.6, 7.5.11.2 (1985).+
Ohio	two	non-SEA employee/ official	Ohio Admin. Code § 3301 - 51 - 02(G)(12)(1982).
Oklahoma	two	non-SEA employee/ official	1988-90 Okla. St. Plan Under Pt. B of P.L. 94-142, at 54.+
Oregon	two	non-SEA employee/ official	Or. Admin. R. 581- 15 105 (2)(b)(1988).
Pennsylvania	two	Secretary of Education	22 Pa. Code § 13.32 (24)(1983).
Rhode Island	two##	non-SEA employee/ official	Regs. of the Bd. of Regents for Elementary & Secondary Educ. Governing the Special Educ. of Handicapped Children, Section One, IX, 10.1 (1986).
South Carolina	two	non-SEA employee/ official	1988-90 S.C. St. Plan Under Pt. B of P.L. 94-142, at 58.

A third level of review, to the Rhode Island Board of Regents, apparently may be used at the option of the parents before proceeding in court.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
South Dakota	one	N/A	S.D. Admin. R. § 24:05:07:16 (1988). +
Tennessee	one	N/A	Tenn. Comp. R. & Regs. ch. 0520-1-3-. 0 9 (5)(f)(16) (eff. 1987). +
Texas	one	N/A	Texas Admin. Code tit. 19, § 157.97(h)(1988).
Utah	two	non-SEA employee/ official	Utah St. Office of Educ., Special Educ. Rules § V(C)(1)(1988).
Vermont	two	non-SEA employee/ official	Manual of Rules & Practices of the St. of Vt. Bd. of Educ. § 2364.3.6 (1988). +
Virginia	two	non-SEA employee/ official	Regs. Governing Special Educ. Programs for Handicapped Children & Youth in Va., II(C)(1)(k) (eff.1/1/85). +
Washington	one	non-SEA employee/ official	Wash. Admin. Code §§ 392-171-536, -561 (1986). +
West Virginia	two	non-SEA employee/ official	W. Va. Regs. for the Educ. of Exceptional Students, Policy 2419, § 3(I)(2)(eff. 7/1/88).

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Wisconsin	two	non-SEA employee/ official***	Wis. Dept. of Pub. Instruction, Information Update, Bull. No. 85.7 (Dec. 1985).
Wyoming	one	non-SEA employee/ official	1988-89 Wyo. St. Plan Under Pt. B of P.L. 94-142, ch. VII, §§ 10(b), 14.

***The Information Update cited changed Wisconsin's system to one using private attorneys as review officers. The Wisconsin statute states that the review is conducted by the State Superintendent of Instruction (Wis. Stat. Ann. § 115.81(7)(West Supp. 1988), but this practice is not followed.

Exhibit B

Revised DAS Bulletin #107

January 16, 1984

INFORMAL LETTER TO CHIEF STATE SCHOOL OFFICERS

SUBJECT: **Qualifications of State Level Reviewing Officials under Part B of the Education of the Handicapped Act (EHA-B)**

During the initial years of administering EHA-B, the Special Education Programs Office (SEP) interpreted section 615(c) of the Act to mean that State education agency (SEA) employees, chief state school officers, and members of State boards of education could serve as reviewing officials under certain circumstances. In recent years, however, questions have arisen about this interpretation.

As case law developed in this area, it became clear that SEP's initial interpretation of section 615(c) should be reconsidered and appropriate clarification made. Our review of the express language of the statute, its legislative history and the varied positions taken by different Federal courts has led us to conclude that with respect to the designations of SEA employees, chief state school officers and members of State boards of educations a presumption arises under the Act that such persons are involved in the education and care of all handicapped children in the state and, thus, are generally precluded from serving as state level review officials under section 615(c). Absent a clear and convincing rebuttal, this presumption operates as a categorical prohibition.

In order to comply with the requirements of section 615(c), it is SEP's position that a State educational agency must

either preclude the designation of SEA employees, chief state school officers and members of State boards of education from serving as state level review official or rebut the presumption described above by demonstrating that the State educational agency has in effect formal written procedures which ensure that accepted standards of procedural fairness and impartiality will be followed in the selection of state level review officials. At a minimum such standards must include.

(1) Any SEA employee or official designated to serve as a state-level review official will be a person who is not and has not been routinely personally involved in decision made by local education agencies regarding any aspect of the identification, evaluation, placement or provision of free appropriate public education to handicapped children in such agencies either before or after such decisions are made;

(2) Any SEA employee or official designated to serve as a state-level review official will be a person who has not in any way been personally involved in any aspect of any decision made by a local school district with respect to the child about whom the hearing is concerned or with respect to similarly situated children in such school district;

(3) Any SEA employee or official designated to serve as a state-level review official will be a person who has not been in any way substantially involved in the development of any state or local policy or procedure which is directly or indirectly being challenged by the hearing;

(4) Any SEA or official designated to serve as a state-level review official will be a person:

(a) who is not, and has not at any time been, employed by the local educational agency or state agency which is a party to the hearings;

(b) who has not participated in the selection of the administrators of such local or state agency; and

(c) who has no personal, economic or professional interest in the outcome of the hearing other than the proper application of Federal and State laws, regulations and policies;

(5) No SEA employee or official will be designated to serve as a state-level review official with respect to any hearing to which the state education agency, any SEA subdivision, or any education program operated by (or provided under a contract or other formal arrangement with) the SEA, is a party;

(6) No SEA employee or official will be designated to serve as a state-level review official with respect to any proceeding which challenges the actions of any employee or official of the state educational agency;

(7) Neither person(s) in the state educational agency responsible pursuant to Section 612(b) of the Act for the general supervision of education programs for handicapped children nor any members of such person's staff may serve as a state-level review official; and

(8) A parent or other guardian of a handicapped child who is a party to a state-level review may formally challenge the impartiality of any proposed state-level review official on the basis of any of the standards listed in criteria (1)-(7) above.

This interpretation of the statute directly affects the EHA-B State plans in a number of states that have State review of local level hearings; and it may require some States to seek legislative change in their policies and procedures. A transition period will be allowed for states that are affected, based on procedures set out below:

If a State's EHA-B plan for FY 1984-86 does not include procedures that are consistent with the above interpretation, SEP will accept amended procedures submitted to SEP no later than June 30, 1984 to be implemented in the State no later than October 1, 1984.

If a State submits these procedures as an amendment to its FY 1984-86 plan, the public participation requirements in the EDGAR and EHA-B regulations must be met, because the revised procedures constitute a significant change in the plan.

Submission of procedures that are consistent with the above interpretation is one of the conditions that must be met in order for a State to receive its EHA-B grant for the fiscal year 1985.

An exception to the above transition period must be made in any State that is directly affected by a judicial ruling on this issue. In such a case, the State's FY 1984-86 plan must include due process procedures that are consistent with the court's ruling, in order for the plan to be approved.

If you have any comments or questions about this letter, or if our Office can be helpful in any way in revising your state level review procedures, please contact Dr. David Rostetter, Acting Director, Division of Assistance to States. ((202) 472-3796)

GARRY L. MCDANIELS
Director
Office of Special Education Programs